

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of the Application of Rapids
Power LLC for a Certificate of Need for its
Grand Rapids Cogeneration Project

ISSUE DATE: October 9, 2001

DOCKET NO. IP-4/CN-01-1306

ORDER GRANTING EXEMPTIONS FROM
FILING REQUIREMENTS, PERMITTING
EXPEDITED FILING, AND EXTENDING
PERIOD TO DETERMINE ADEQUACY OF
FILING

PROCEDURAL HISTORY

On August 22, 2001, Rapids Power LLC (Rapids Power or the Company) filed a petition stating that it intended to submit an application for a certificate of need to construct a cogeneration facility near the Blandin Paper mill in Grand Rapids. The petition requested exemptions from eight data requirements in the certificate of need rules,¹ claiming that Rapids Power's status as an independent power producer either made these requirements irrelevant or made the Company unable to comply with them.

On August 24, 2001, the Commission issued a Notice of Comment Periods, asking interested persons for comments on the Company's exemption requests. On September 17, 2001, the Commission issued an Order extending the 30-day time period set by rule for acting on exemption requests.

On September 6, 2001, the Minnesota Department of Commerce filed comments that recommended granting all the requested exemptions. On the same date, the World Organization for Landowner Freedom, Inc. (W.O.L.F.) filed comments that recommended denying all the requested exemptions.

On September 10, 2001, the Company filed its certificate of need application, stating that it recognized it would have to supplement the application should the Commission deny some or all of its exemption requests. The Company also asked the Commission to vary the rule requiring a 45-day interval between filing exemption requests and filing a certificate of need application.²

¹ Minn. Rules, parts 7849.0010 *et seq.*

² Minn. Rules 7849.0200, subp. 6.

On September 13, 2001, the Company filed replies to the comments of the Department of Commerce and W.O.L.F.

On October 4, 2001, the case came before the Commission.

FINDINGS AND CONCLUSIONS

I. The Application

Rapids Power is a limited liability company made up of Blandin Paper, a subsidiary of UPM Kymmene, and Rainy River Energy Corporation, an unregulated subsidiary of Minnesota Power.

The Company proposes to build a cogeneration plant near the Blandin Paper mill in Grand Rapids. The plant would use circulating fluidized bed combustion technology to produce approximately 84 MW of process heat for Blandin's operations and 225 MW of electricity for sale on the wholesale market. The plant would be fueled by a combination of biomass (waste wood resources) and low-sulfur coal.

The Company hopes to have the plant operating in 2005.

II. Positions of the Parties

A. The Company

The Company pointed out that the certificate of need rules were written when power plants were built by utilities with a duty to provide an adequate, safe, and affordable power supply to a clearly defined set of retail customers. Since that time, both state and federal policy have evolved to encourage non-utility generators, such as independent power producers and cogenerators, to enter the electricity market. For these non-utility generators, filing requirements designed to ensure that utilities are building to meet the needs of their service areas – no more and no less – are irrelevant.

The Company also pointed out that the Commission has waived these and similar filing requirements in other cases involving non-utility generators.³

Finally, the Company stated that it would file as much alternative, relevant information as possible, to give the Commission a solid factual basis for decision-making.

³ In the Matter of the Application by Koch Refining Company for Certification of the Pine Bend Cogeneration Project, Docket No. IP-2/CN-95-1406; In the Matter of the Application of Lakefield Junction LLC for a Certificate of Need for a Large Electric Generating Facility, Docket No. IP-3/CN-98-1453; In the Matter of the Application by LSP-Cottage Grove, L.P. for a Certificate of Need for a Large Generating Facility, Docket No. IP-1/CN-94-004.

B. The Department of Commerce (the Department)

The Department recommended granting the exemptions requested for the reasons given by the Company. The agency noted that in most cases the Company would be filing more relevant data than that required in the rules.

The Department believed that the filed information would be adequate to support informed decision-making and that any additional information that proved necessary could be obtained through discovery.

C. The World Organization for Landowner Freedom, Inc. (W.O.L.F.)

W.O.L.F. opposed all the exemptions requested by the Company, based on the following general claims:

1. Rapids Power will have to present much of the information at issue in future filings with the Mid-Continent Area Power Pool.
2. This case presents the fundamental policy issue of whether this state should permit the construction of a plant to produce power for export while facing a potential power shortage itself.
3. This case presents fundamental policy issues regarding the appropriate regulatory stance when a regulated utility, which has a statutory duty to provide safe and reliable power at the lowest reasonable retail price, has an ownership interest in an independent power producer, which has a lawful interest in obtaining the highest possible wholesale price.

W.O.L.F. also challenged individual requests for exemptions on specific grounds; those challenges are addressed below.

III. Exemptions Granted

A. Introduction

The certificate of need rules permit the Commission to exempt applicants from particular filing requirements upon finding that the information they require will not be necessary to determine need or that the information they require can be supplied by filing another document. Minn. Rules 7849.0200, subp. 6. The Commission will grant the exemptions requested by the Company on grounds that the information to which they relate is unnecessary to determine need and notes that in most cases the Company proposes to file other information that *is* necessary.

Most of the filing requirements from which the Company seeks relief pertain to regulated utilities. They speak of the applicant's "system," a term of art defined in the rules to include the applicant's assigned service area and all the equipment and facilities used to serve retail

consumers within that assigned service area.⁴ Since Rapids Power has neither an assigned service area nor retail consumers, it does not have a system. Information on its system is therefore non-existent, not relevant to the application, and unnecessary to determining need.

Further, the Company has proposed, wherever the purpose of the rules can be served by filing alternative information, to do so. Instead of filing information on the proposed facility's effects on retail rates, for example, the Company will file information on its effects on wholesale rates. Similarly, while the Company cannot file demand and capacity forecasts for a service area it does not have, it can and will file state and regional demand and capacity forecasts, obtained from the Mid-Continent Area Power Pool.

The Commission agrees with the Department of Commerce that the information the Company proposes to file is reasonably likely to provide an adequate factual basis for determining need.

Furthermore, the burden of proving need for the proposed facility remains with Rapids Power. If the information the Company files is not sufficient to demonstrate need for the facility, the application will fail. The Company still has every incentive, then, to provide full and complete information as its application undergoes regulatory scrutiny.

B. Specific Exemptions

W.O.L.F. specifically challenged each exemption the Company requested. The Commission finds none of these challenges persuasive, for the reasons set forth below.

1. Rate Effects – Minn. Rules 7849.0250 C (7)

The rule requires the applicant to give “an estimate of its [the proposed facility's] effect on rates systemwide and in Minnesota, assuming a test year beginning with the proposed in-service date.”

The Company requested a partial exemption, since it does not have a system as defined in the rules⁵ and does not have rates set using a traditional regulatory test year. The Company stated that it would provide information on how it expected this project to affect Minnesota wholesale prices.

W.O.L.F. protested that it is not necessary to have a “system” to provide this information.

The Commission finds that “system” has the meaning set forth in the rules, that Rapids Power has no system, that it has no rates set on the basis of a test year, and that this non-existent information is not necessary to determine need. Further, the Company's proposal to submit information on the facility's effects on statewide wholesale rates meets the purpose of the rule, which is to ensure that the cost of utility service receives due consideration when new facilities are considered.

⁴ See the rules' definitions of “system,” Minn. Rules 7849.0010, subp. 29, and “ultimate consumer,” Minn. Rules 7849.0010, subp. 31.

⁵ Minn. Rules 7849.0010, subp. 29.

This exemption is granted because the information to which it relates is not necessary to determine need.

2. System Map – Minn. Rules 7849.0250 D

The rule requires the applicant to file a map of its system. The Company requested an exemption on grounds that it does not have a system, as that term is defined in the rules. Minn. Rules 7849.0010, subp. 29.

The absence of a system as defined by the rules does not affect need or lack of need for a wholesale power plant. This exemption is granted because the information to which it relates is not necessary to determine need.

W.O.L.F. suggested requiring the Company to file a map of neighboring systems. At present there does not appear to be any need for the record to contain maps of neighboring utility systems. Should a need develop, those maps can no doubt be obtained.

3. Peak Demand and System Capacity – Minn. Rules 7849.0270 and 7849.0280

These rules require detailed filings on peak demand, actual and projected annual electric consumption, and system capacity within the applicant's service area and system. The Company requested an exemption on grounds that it has no system, as that term is defined in the rules, and no service area.

The Company stated that it would file information on forecasts of demand, electrical consumption, and committed and projected capacity additions derived from the most recent Load and Capability Reports of the Mid-Continent Area Power Pool (MAPP).

W.O.L.F. argued that forecasting is critical to determining need and that this exemption should therefore be denied. The Commission disagrees. The Company cannot file forecasts on the needs and capacities of a system it does not have. The Company will be filing forecasts that pertain directly to its intended market, wholesale power sales, meeting the purposes of the rule.

This exemption is granted because the information to which it relates is not necessary to determine need.

4. Conservation Programs – Minn. Rules 7849.0290

These rules require applicants to file detailed descriptions of present, future, and potential conservation and energy efficiency plans. They also require detailed analysis of how these plans will affect future demand and future needs for generation, transmission, and other large energy facilities on the applicant's system.

The Company sought an exemption on grounds that conservation programs are operated by utilities, not independent power producers; on grounds that it did not have access to or control over the conservation plans of the utilities to whom it planned to sell wholesale power; and on grounds that it did not have a system, as that term is used in the rules, for which it could calculate conservation effects.

W.O.L.F. emphasized the importance of conservation programs and stated that the Commission should either require compliance with the filing requirement or “draw a negative inference” from the Company’s request for an exemption.

The Commission disagrees. This rule is designed to ensure that regulated utilities, providing essential services to captive customers, give conservation the same careful consideration that they give new generation in planning to meet the future needs of their service areas. That is why the rule consistently requires system-specific information. Different considerations apply in the wholesale context, making the specific filings of this rule not only onerous but essentially unhelpful.

This exemption is granted because the information to which it relates is not necessary to determine need.

5. Consequences of Delay – Minn. Rules 7849.0300

This rule requires discussion of the consequences of a delay in the construction of the proposed facility on the applicant’s system, neighboring systems, and the power pool. The Company again pointed out that it did not have a service area or a system, as the latter term is defined in the rules, but proposed to file information on the consequences of delay to its potential customers, neighboring systems, and the region.

W.O.L.F. pointed out that the Company could provide information on the consequences of delay to neighboring systems and the power pool, which the Company has stated it will do.

This exemption is granted because the information to which it relates is not necessary to determine need.

6. The “No Facility” Alternative – Minn. Rules 7849.0340

The rule requires the applicant to analyze how a decision not to build the proposed facility would affect the applicant’s existing generation and transmission facilities, its system, and its operations. The rule also requires an analysis of ways to reduce the environmental impact of not building the facility.

The Company stated that it had no existing generation or transmission facilities, no system, as that term is used in the rules, and no service area. The Company stated that it would, however, file information on the likely consequences of not building the project.

W.O.L.F. stated that the Company should provide information on the “no-build” option, which the Company has stated it will do

This exemption is granted because the information to which it relates is not necessary to determine need.

7. Promotional Activities – Minn. Rules 7849.0240, Subp. 2 B

This rule requires an explanation of how promotional activities may have affected the need for the facility. The Company sought an exemption on grounds that it had engaged in no promotional activities connected to the need for the proposed facility and therefore had no promotional activities to report.

W.O.L.F. claimed that Minnesota Power's activities in seeking regulatory approval of the Arrowhead Powerline (the transmission outlet for the proposed facility) were "promotional activities" that contributed to the need for the facility and that these activities should therefore be disclosed and analyzed.

The Commission disagrees. Not only is Minnesota Power not a party to this case, but regulatory filings are not "promotional activities." This exemption is granted because the information to which it relates is not necessary to determine need.

C. The Company's MAPP Filing

W.O.L.F. also claimed that Rapids Power would have to file with the Mid-Continent Area Power Pool some of the information it asked to be exempted from filing in this case and that this Commission should not require less information than MAPP.

The Commission will not deny the Company reasonable exemptions from filing requirements on the basis of conclusory claims that MAPP may require similar filings.

D. W.O.L.F.'s Policy Concerns

W.O.L.F. also raised two policy issues – (1) whether Minnesota's certificate of need process should be used to permit construction of a plant to produce power for export when the state is facing a potential power shortage itself; and (2) the appropriate regulatory treatment of merchant plants in which regulated utilities hold an ownership interest.

First, it is not clear that this case presents either issue. This application is still in the initial stages, and the facts that would signal the need to address either issue have not been developed.

Second, both issues, should they turn out to be present, would go to the merits of the application, not to these requests for exemptions from filing requirements.

The Commission will therefore grant the requested exemptions for all the reasons set forth above.

IV. 45-Day Interval Varied

The Company filed its exemption requests on August 22 and its certificate of need application on September 10, nineteen days later. The rules require a 45-day interval between filing exemption requests and filing a certificate of need application.⁶ The Company asked the Commission to vary the rule and stated that its purpose in filing early had been to give the public and all parties additional time to review the application, which is subject to a statutory deadline for Commission action.

Under Minn. Rules 7829.3200, the Commission can vary any of its rules upon making the following findings:

1. Enforcing the rule would impose an excessive burden upon the applicant or others affected by the rule;
2. Granting the variance would not adversely affect the public interest; and
3. Granting the variance would not conflict with any standards imposed by law.

The Commission will vary the rule requiring the 45-day interval, based on the following findings.

1. Enforcing the 45-day interval would impose an excessive burden on the parties to the case, who would have less time to analyze and respond to the Company's filing, and on the public, which has an interest in a thorough and well-considered proceeding.
2. Granting the variance would not adversely affect the public interest, but would serve the public interest by providing more time for evidentiary development, briefing, and reasoned decision-making;
3. Granting the variance would not conflict with any standards imposed by law.

Finally, certificate of need applications are subject to a six-month statutory deadline for Commission action.⁷ That six-month period normally begins to run on the date an application is filed (assuming that the application is substantially complete). In this case, however, the Company's reason for filing early and the Commission's reason for granting the variance – to give the public and the parties additional time to examine the application – assumes that the Commission will treat the official filing date as the first date the application could have been filed under the rule.

The Commission will therefore treat the application as if it had been filed on October 8, 2001, for purposes of striving to meet the statutory deadline.

⁶ Minn. Rules 7849.0200, subp. 6.

⁷ Minn. Stat. § 216B.243, subd. 5.

V. Adequacy Review Period Extended

The rules require the Commission to determine within 30 days of filing whether or not a certificate of need application is substantially complete.⁸ The Commission has reviewed Rapids Power's application and finds that careful consideration of its completeness will require more than 30 days.

This case is complex and in many ways unique. To avoid delay and inefficiency as the case progresses, it is critical to begin with a substantially complete filing. The Commission has therefore solicited comments on completeness from interested persons. Receiving, analyzing, and acting on those comments will require more than 30 days from the date the application was filed.

The Commission will therefore vary the 30-day time line of Minn. Rules 7849.0200, subp. 5, making the following findings:

- (1) Enforcing the 30-day time line would impose an excessive burden upon the public, upon parties to the proceeding, and upon the Commission, by jeopardizing the thoroughness of the Commission's decision-making process;
- (2) Varying the 30-day time line would not adversely affect the public interest and would in fact serve the public interest by protecting the Commission's decision-making process;
- (3) Varying the 30-day time line would not conflict with any other standards imposed by law.

The Commission will promptly review the comments of the parties and will determine whether or not the application is substantially complete as soon as practicable.

The Commission will so order.

ORDER

1. The Commission grants the petition of Rapids Power LLC for exemptions from specific data requirements in the certificate of need rules.
2. The Commission varies Minn. Rules 7849.0200, subp. 6, to permit the filing of the Company's September 10, 2001 certificate of need application. The Commission will treat the filing date of that application as October 8, 2001, however, for purposes of calculating statutory deadlines.

⁸ Minn. Rules 7849.0200, subp. 5.

3. The Commission varies Minn. Rules 7849.0200, subp. 5 to extend the time for determining whether the certificate of need application filed by Rapids Power LLC is substantially complete.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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